LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 24 1968
JOHN F. DAVIS, CLERK

In The

SUPREME COURT of the UNITED STATES

October Term, 1968

~~336~~

UNITED STATES OF AMERICA,

Respondent,

vs.

ANTON LYSCZYK,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

JASPER, WINNER, PERINA
& ROUSE

By ROBERT I. PERINA
DONALD R. McCALLUM

111 South Fairchild Street
Madison, Wisconsin 53703
(608) 257-2504

Attorneys for Petitioner

THE GILMAN PRESS, INC., MADISON, WISCONSIN

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction of the Court	2
Questions Presented	3
Constitutional and Statutory Provisions	4-5
Statement of the Case	5-9
Reasons for Allowance of the Writ	9-14
Conclusion	14
Appendix A (Decision of the United States Court of Appeals for the Seventh Circuit)	1a

Cases Cited

Aguilar v. Texas, 378 U. S. 108	10, 11
Giordenello v. United States, 357 U. S. 480	10, 11
Jones v. United States, 362 U. S. 257	10
Sykes v. United States (5th Cir. 1966), 373 F. 2d 607	12
United States v. Burrell (7th Cir. 1963), 324 F. 2d 115	12
Washington v. Texas, 388 U. S. 14	13, 14

Federal Statutes

PAGE

18 U. S. C. Section 2 7

18 U. S. C. Section 371 7

18 U. S. C. Section 1952 ..... 6, 7

18 U. S. C. Rules of Criminal Procedure, Rule 41(c) 3, 4, 10

18 U. S. C. Rules of Criminal Procedure, Rule 52(b) 5, 12

28 U. S. C. Section 1254(1) 2

United States Constitution

Fourth Amendment 4, 14

Sixth Amendment 4, 13

In The

SUPREME COURT of the UNITED STATES

October Term, 1968

UNITED STATES OF AMERICA,

Respondent,

vs.

ANTON LYSCZYK,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Petitioner, ANTON LYSCZYK, through his counsel, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in *United States of America vs. Anton Lysczyk.*

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at ....., F. 2d ..... (June 27, 1968), a copy of which is contained herein as Appendix A.

JURISDICTION

The Court of Appeals for the Seventh Circuit affirmed the judgment of conviction of the petitioner Lysczyk on June 27, 1968.

No petition for rehearing has been filed.

The petitioner believes that 28 U. S. C. 1254(1) confers on this Court jurisdiction to review the judgment of the Court of Appeals of the Seventh Circuit.

QUESTIONS PRESENTED

1. Were the mandates of the Fourth Amendment prohibiting unreasonable search and seizure, and Rule 41(c) of the Federal Rules of Criminal Procedure, violated when the Commissioner issued a search warrant wherein, with a single exception, the supporting affidavit was based solely on information and belief and did not indicate any sources for the affiant's belief or set forth any other basis upon which a finding of probable cause could be made?

2. Was the petitioner denied a fair and impartial trial and due process of law where he was unable to present testimony in his defense because, unlike the prosecution, he could not promise his witnesses immunity?

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Federal Rules of Criminal Procedure, Rule 41(c):

> Issuance and Contents. A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the

persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned.

Federal Rules of Criminal Procedure, Rule 52(b):

> Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT OF THE CASE

On November 17, 1965, a search warrant was issued by the United States Commissioner for the Western District of Wisconsin directing that Kay's Rooms & Hotel Bar, located at 7-9 Silver Street, Hurley, Wisconsin, be searched for a ledger book and that it be seized. (R. 59) The issuance of the search warrant was based upon the following affidavit.

Affidavit for Search Warrant

"Malvin Lee Wessel, being first duly sworn, upon his oath deposes and says:

That he is a Special Agent of the Federal Bureau of Investigation, and that in that capacity he has personally investigated complaints of the violation of the laws of the United States of America at Hurley, in the Western District of Wisconsin, and that of his own personal knowledge MARCIA LYON is the operator

of Kay's Rooms and Hotel Bar, located at 7-9 Silver Street, Hurley, Wisconsin; and that as such operator and on information and belief she has maintained a ledger book containing numbers which have been assigned to acceptable patrons of her illegal operation of a house of prostitution within said premises; and that said ledger book contains the name of the city of address of such patron, followed by a numerical number which indicates the price paid for the services of a prostitute.

That this affidavit is made for the purpose of securing a search warrant to seize the above-mentioned ledger book.

That the grounds for the search and seizure are to preserve as evidence the above-mentioned records, which are evidence of the operation of an illegal house of prostitution, which constitutes the basis of a conspiracy to violate Section 1952 of Title 18 of the United States Code.

Affiant further states that on information and belief your affiant says that the said Marcia Lyon has engaged in a conspiracy to violate Section 1952 of Title 18 of the United States Code by soliciting females from out of the state of Wisconsin, to wit, from St. Louis, Missouri, and Terre Haute, Indiana, to come to Wisconsin to engage in prostitution at her said place of business, and as a result of such solicitation females from both St. Louis, Missouri, and Terre Haute, Indiana, did travel into the Western District of Wisconsin for the purpose of and did engage in prostitution at said place of business, in violation of Section 1952 of Title 18 of the United States Code.

Affiant further states on information and belief that a significant portion of the numbers so assigned in said

ledger book refer to patrons who reside outside of the State of Wisconsin.

/s/ Malvin Lee Wessel
Special Agent, F. B. I.

Subscribed and sworn to before me
at Madison, Wisconsin, Nov. 17, 1965.

/s/ John R. Adams
United States Commissioner
Western District of Wisconsin" (R. 869)

A search of the described premises was made on the 22nd day of November, 1965, and the ledger book was seized by the F. B. I. agents. (R. 59)

On December 2, 1965, the petitioner and Marcia Lyon were charged in a six count Indictment. (R. 735) Subsequently, four of the six counts were dismissed either before or during the trial against each of them. A joint trial of both defendants was had before a jury. Judgment of conviction was entered in the Federal District Court for the Western District of Wisconsin on the 19th day of June, 1967, based upon the jury verdict finding them guilty on Counts I and III of the Indictment. Count I charged petitioner and Marcia Lyon with conspiracy to travel in, and to use the facilities of, interstate commerce with intent to carry on a prostitution enterprise unlawful in the State of Wisconsin, in violation of 18 U. S. C., Section 371. Count III charged them with travel in, and/or inducing others to travel in, interstate commerce to carry on a prostitution enterprise unlawful in the State of Wisconsin, in violation of 18 U. S. C., Sections 2 and 1952. Petitioner and defendant Lyon were each fined One Thousand Dollars ($1,000.00)

and sentenced to three (3) years imprisonment on each count, the sentences to run concurrently. (R. 849, 850)

During the trial, the ledger (seized subject to the search warrant) was marked for identification and testimony was taken after objection by defense counsel. (R. 55-77). Objection at that time was made to the introduction of the ledger on the grounds that the search warrant was not served on the proper defendant, Lyon, and that when the seizure was made Lyon was not advised of her right to an attorney. (R. 56) These objections were overruled by the Court and the witnesses Payne (R. 83), Maynard (R. 97), Dixon (R. 158), and Wessel (R. 228) then testified in the presence of the jury regarding this exhibit. The defendant Lyon also testified regarding this exhibit. (R. 387-404) This ledger was subsequently sent to the jury room for their examination. (R. 720)

The petitioner had subpoenaed two witnesses, Small and Stone, to testify on his behalf. (R. 484-506) Both of these witnesses had counsel present. (R. 158) Both witnesses refused to testify on the grounds that their answers might tend to incriminate them. Defense counsel requested that the witnesses be granted immunity to compel their testimony. (R. 487) The prosecutor refused to move to grant them immunity and objected to it and the Court ruled that it had no authority to grant such immunity. (R. 488)

Prior to this time, during the course of the Government's case, witnesses were called who testified that they had been promised immunity by the Government for their testimony (R. 309-312), or had immunity discussed with them (R. 99), or testified that charges would be dismissed in return for their testimony. (R. 86)

In addition, the Government produced the witness DeLay who testified on direct examination to many incriminating matters. (R. 240-245) She had been advised that she was granted immunity by an F. B. I. agent. (R. 309-312) However, the United States Attorney, after her direct testimony, stated she had not been granted immunity. (R. 288) On cross-examination by defense counsel she refused to testify on the grounds her answers would tend to incriminate her as to the following questions: Her current address (R. 330); nature of her present work (R. 334); the type of her work and current earnings (R. 335); her present employer (R. 330); in whose company she left Hurley for St. Louis (R. 338); whether she turned money over to the defendant Lyon (R. 341); and, who took her away from the defendant's residence (R. 341). Defendant's attorney objected that he was denied the right of cross-examination and requested a mistrial. (R. 349) The trial court ruled that the witness testified against the defendants and that the defendants were deprived of a full opportunity to cross-examine her, and therefore, it denied the motion for a mistrial but granted a motion to strike all of her testimony. (R. 356)

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The affidavit in support of the search warrant which directed the seizure of the ledger was based almost entirely upon information and belief. The only fact recited on knowledge was that Marcia Lyon was the operator of Kay's Rooms & Hotel Bar located at 7-9 Silver Street, Hurley, Wisconsin. Thereafter, all of the allegations regard-

ing the maintenance of this ledger book and the information contained therein and the recitation of information that a conspiracy had been entered into by solicitation of females out of the State of Wisconsin to engage in prostitution in Wisconsin were all based on information and belief and there was absolutely no recitation indicating the sources of the affiant's belief.

Rule 41(c) requires that probable cause be shown before the issuance of the warrant. This was not done because the Commissioner was not apprised of the source of the affiant's information.

The petitioner submits that the instant affidavit contains the same defects as those referred to in *Giordenello vs. United States*, 357 U. S. 480, 486:

> "The complaint contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; it does not indicate any sources for the complainant's belief; and it does not set forth any other sufficient basis upon which a finding of probable cause could be made."

The fact that an affidavit is based on information and belief is not fatally defective in and of itself. However, there must be presented a substantial basis for crediting the hearsay. *Jones vs. United States*, 362 U. S. 257, 269.

The instant affidavit provided the Commissioner with absolutely no information as to the affiant's source and therefore the Commissioner was precluded from making an independent determination as to whether the warrant should or should not issue, and it thus had the same effect as was cited in *Aguilar vs. Texas*, 378 U. S. 108, 111 of reducing the Fourth Amendment to a "nullity and leave

the peoples' home secure only in the discretion of police officers."

Exactly as in *Aguilar vs. Texas, supra,* pages 113, 114, wherein the Court said:

> "The affidavit here not only 'contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein,' it does not even contain an 'affirmative allegation' that the affiant's unidentified source 'spoke with personal knowledge.' For all that appears, the source here merely suspected, believed or concluded that there were narcotics in petitioner's possession. The magistrate here certainly could not 'judge for himself on the persuasiveness of the facts relied on . . . to show probable cause.' He necessarily accepted 'without question' the informant's 'suspicion,' 'belief' or 'mere conclusion.' "

It is petitioner's contention that the warrant in the instant case should not have been issued because the affidavit did not provide a sufficient basis for the finding of probable cause, and that the evidence obtained as a result of the search was therefore inadmissible.

The issuance of the warrant was plain error. It was both obvious and substantial. A reading of the supporting affidavit clearly shows that this supporting document does not meet the requirements of *Aguilar, supra,* and *Giordenello, supra.* The ledger seized pursuant to the warrant was the key piece of physical evidence used by the Government. It was testified to in detail by various witnesses including the defendant Lyon. It was sent to the jury for their deliberation.

Even though there was no pretrial motion to exclude this evidence, this objection may be noticed as plain error

on appeal—Rule 52(b), Federal Rules of Criminal Procedure *Sykes vs. United States,* (5th Circuit) 373 F. 2d 607, 612 (1966), even though *United States vs. Burrell,* (7th Circuit) 324 F. 2d 115, 119 (1963) held to the contrary, thus creating a conflict between these circuits.

Petitioner believes that this was error of such a nature as to affect the substantial rights of the petitioner and may be noted by this Court even though the defects of the search warrant were not brought to the attention of the trial court. This is such a fundamental right that notice should be taken of this grave defect.

2. The petitioner was denied a fair and impartial trial and due process of law because he was unable to present testimony in his defense because, unlike the prosecution, he could not promise his witnesses immunity.

During the prosecution's case, witnesses were called to testify that they had been promised immunity, or charges would not be brought against them, or charges would be dismissed against them in return for their testimony. One witness testified on direct examination in the belief that she had immunity, and then refused to testify on cross-examination and refused to divulge her current address and occupation on the grounds that such answers would tend to incriminate her. Irreparable harm was done to the petitioner even though her testimony was stricken.

The petitioner subpoenaed two witnesses to testify in his behalf. These witnesses had also been subpoenaed by the United States Attorney but not called by him. When these witnesses were called to the stand by the defense counsel, they refused to testify on the grounds their answers would tend to incriminate them. Defense counsel

requested that the U. S. Attorney grant them immunity so they could testify, but this request was not granted. The witnesses thereafter refused to testify. It is the petitioner's contention that because he was unable to present testimony favorable to him that he was denied a fair trial.

As was stated in *Washington vs. Texas*, 388 U. S. 14:

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has a right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."

We submit that to be able to compel a witness to appear in Court on behalf of the defendant is meaningless if the witness cannot also be compelled to testify. The only manner in which the petitioner's witnesses could be forced to testify would be by a grant of immunity. When the prosecutor refuses to grant this immunity, then the fact that the witnesses have been produced on behalf of the defendant but refuse to testify, places the defendant in a worse light in the eyes of the jury than if he had not produced the witnesses in the first place.

We therefore have the paradoxical situation in which the prosecution can promise immunity or dismissal of charges against a witness to induce them to testify and then produce that testimony, and while the defendants are guaranteed the right to compel attendance of witnesses (Sixth Amendment, United States Constitution; *Washing-*

ton vs. Texas, 388 U. S. 14), they are precluded from granting witnesses immunity to elicit testimony favorable to the defendant. Unless a witness can be compelled to testify under a grant of immunity, the mere fact that the witnesses can be compelled to appear in Court satisfies form while it violates substance. Therefore, it is submitted that this petitioner was denied a fair trial because he was not allowed to present a defense as is guaranteed by the Sixth Amendment.

CONCLUSION

The petitioner's basic rights under the Fourth Amendment were violated by the search and seizure conducted pursuant to the search warrant. The supporting affidavit was such a plain and obvious error, and was so substantial in nature that it can be, and should be, noticed and a new trial granted excluding this evidence.

In addition, the petitioner was unable to produce evidence on his behalf because his witnesses could not be granted immunity from prosecution and he was therefore precluded from presenting a defense.

The petitioner now requests the Supreme Court of the United States to allow a writ of certiorari to issue to determine these issues.

Respectfully submitted,

ROBERT I. PERINA
DONALD R. McCALLUM
Attorneys for Petitioner Lysczyk

In The

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1967 — APRIL SESSION, 1968

Nos. 16518-16519
UNITED STATES OF AMERICA
Plaintiff-Appellee,
v.
MARCIA LYON and ANTON LYSCZYK,
Defendants-Appellants.

Appeal from the United States District Court for the Western District of Wisconsin.

JUNE 27, 1968

Before HASTINGS, FAIRCHILD and CUMMINGS, *Circuit Judges.*

HASTINGS, *Circuit Judge.* Marcia Lyon and Anton Lysczyk appeal from a judgment of conviction entered June 19, 1967 on a jury verdict finding them guilty on Counts I and III of a six count indictment. Count I charged appellants with conspiracy to travel in, and to use the facilities of, interstate commerce with intent to carry on a prostitution enterprise unlawful in the State of Wisconsin, in violation of 18 U. S. C. A. § 371. Count III charged them with travel in, and/or inducing others to travel in,

interstate commerce to carry on a prostitution enterprise unlawful in the State of Wisconsin, in violation of 18 U. S. C. A. §§ 2 and 1952. Other counts were dismissed before and during trial. Each appellant was fined $1,000 and sentenced to three years imprisonment on each count, the sentences to run concurrently.

The charged violations of federal law allegedly occurred between February 1 and August 15, 1965. During that period, it was alleged, appellants operated a house of prostitution at a building owned by them in Hurley, Wisconsin.

Appellants complain of eleven trial errors as grounds for reversal.

As a first ground appellants contend the trial court erred in admitting as evidence a ledger used in the prostitution business. They argue that the search warrant authorizing seizure of the ledger was based on an insufficient affidavit of probable cause.[1]

The record shows that at trial appellants strenuously objected to admission of the ledger, on the grounds that the search warrant was not served on the proper defendant, Lyon, and that at the time of the seizure Lyon was not advised of her right to an attorney. Appellants have abandoned both of these grounds on appeal. The sufficiency of the search warrant was not questioned in pretrial motions, at trial or in post-trial motions.

---

[1]They assert that the affidavit purports to be based on "information and belief" without setting out grounds for crediting the information relied on by affiant, as required by **Jones v. United States**, 362 U. S. 257 (1960) and **Giordenello v. United States**, 257 U. S. 480 (1958).

A motion to suppress evidence on grounds of the insufficiency of a search warrant must be made before trial unless the opportunity for such a motion did not exist or the defendant was unaware of the grounds for the motion; motions to suppress may be entertained at trial in the discretion of the court. Rule 41(e), F. R. Crim. P., 18 U. S. C. A. The admissibility of evidence cannot be questioned in this court on grounds not presented to the trial court. *United States v. Burrell*, 7 Cir., 324 F. 2d 115 (1963), cert. denied, 376 U. S. 937 (1964); *United States v. Sferas*, 7 Cir., 210 F. 2d 69 (1954).

Appellants criticize the Government for its failure to introduce the challenged affidavit or the relevant testimony of the Federal Bureau of Investigation agent who obtained the warrant. This criticism is unjustified. On a motion to suppress the defendant has the burden of establishing that the evidence was unlawfully obtained. *United States v. Melendez*, 7 Cir., 355 F. 2d 914 (1966); *Anderson v. United States*, 10 Cir., 344 F. 2d 792, cert. denied, 382 U. S. 880, reh. denied, 382 U. S. 922 (1965); *Addison v. United States*, 5 Cir., 317 F. 2d 808 (1963), cert. denied, 376 U. S. 905, reh. denied, 376 U. S. 966 (1964); *Chin Kay v. United States*, 9 Cir., 311 F. 2d 317 (1962). Appellants chose not to look behind the search warrant until this appeal. In the absence of a proper objection by appellants the Government had no reason to introduce the affidavit at trial.

Appellants allege error in the admission of an admittance card used in their prostitution business. They contend the Government failed to establish how the card came into its possession, how it was relevant and that it was

authentic. The card is not described in the search warrant nor in the receipt given appellant Lysczyk by the agent who seized the ledger. Appellants' sole trial objection to admission of the card was that there had been no showing that appellants made the "entries" on the card.

The record reveals that a proper foundation was laid for admission of the card. Three government witnesses and appellant Lyon testified to the use of similar cards in appellants' prostitution business. Appellant Lyon testified that the card in evidence would have been issued to the next "customer" who did not already have an admittance card.

At trial, appellants did not question the manner in which the card came into the Government's possession. In the absence of such a challenge the Government had no reason to make such a showing. In any event, it appears from the record that similar cards were used in conjunction with the ledger and that the card in evidence was inside the front cover of the ledger when the ledger was offered in evidence. If so, the card was properly seized by authority of the warrant covering the ledger. We find no error on this contention.

Appellants contend that the closing argument of the United States Attorney stressed appellant Lysczyk's failure to take the stand and refute government evidence. This, they urge, violated 18 U. S. C. A. § 3481 and *Griffin v. California*, 380 U. S. 609 (1965).

Appellants complain of two remarks by the United States Attorney. The first was his comment that there was no testimony tending to refute the evidence that

Lysczyk traveled from Hurley, Wisconsin to Ironwood, Michigan transporting a prostitute to a customer. The second was his comment that it was unrefuted that appellants were co-owners of the building where the prostitution business was conducted. According to appellants, these comments constituted improper references to Lysczyk's failure to testify, since the evidence characterized as unrefuted was such that only Lysczyk could have refuted it.

Appellants' point is not well taken. The prosecutor's comments are to be tested by whether the language used was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be comment on the defendant's failure to testify. *United States v. Fay*, 2 Cir., 349 F. 2d 957, cert. denied, 382 U. S. 921 (1965); *United States v. Wright*, 7 Cir., 309 F. 2d 735 (1962), cert. denied, 372 U. S. 929 (1963); *Knowles v. United States*, 10 Cir., 224 F. 2d 168 (1955).

The challenged comments were made by the United States Attorney as part of a general review of the evidence. The commentary focused on the evidence as a whole and did not emphasize Lysczyk's failure to testify. Lysczyk was not the only witness who could have refuted the Government's testimony concerning ownership of the building and Lysczyk's interstate trip with a prostitute. The jury was instructed that " a defendant has the absolute right not to testify, and the jury must not draw a presumption of guilt or any inference against the defendant because he did not testify."

Considering these factors, we hold the challenged comments had neither the manifest purpose nor the natural and necessary effect of calling the attention of the jury to

Lysczyk's failure to testify. There was no error, particularly in view of appellants' failure to object at trial. See *Moody v. United States*, 9 Cir., 376 F. 2d 525 (1967); *United States v. Weisman*, 2 Cir., 366 F. 2d 767 (1966).

Appellants complain that the trial court's action in denying their pre-trial motion for separate trials and in admitting evidence of their extrajudicial admissions violated their Sixth Amendment right of confrontation. The admissions, placed in evidence by the testimony of an FBI agent, were made by the appellants after the terminal date of the conspiracy charged in the indictment.

Motions for separate trials, governed by Rule 14, F. R. Crim. P., 18 U. S. C. A., are committed to the sound discretion of the trial court. *United States v. Sopher*, 7 Cir., 362 F. 2d 523, cert. denied, 385 U. S. 928 (1966); *United States v. Hickey*, 7 Cir., 360 U. S. 127, 146, cert. denied, 385 U. S. 928 (1966); *United States v. Gardner*, 7 Cir., 347 F. 2d 405 (1965); cert. denied, 382 U. S. 1015 (1966). On their motion appellants made no showing of prejudice. We find no abuse of discretion in the denial of that motion.

Appellants Lyon's admissions did not implicate Lysczyk. Therefore his right of confrontation clearly was not violated.

Lysczyk's admissions implicated Lyon as his partner in the prostitution enterprise. As post-conspiracy declarations they were inadmissible against Lyon under the established rule that co-conspirator's declarations not made pursuant to or in furtherance of the conspiracy charged in the indictment are not admissible against a defendant. See *Krulewitch v. United States*, 336 U. S. 440

(1949); *Fiswick v. United States*, 329 U. S. 211 (1946). Lysczyk did not testify at trial. The introduction of his extrajudicial admissions at this joint trial violated Lyon's Sixth Amendment right of confrontation and that violation could not be corrected by an instruction. See *Bruton v. United States*, — U. S. —, 36 L. W. 4447 (1968). Neither was the violation corrected when Lyon subsequently took the stand and substantially admitted her partnership with Lysczyk. The damning evidence was before the jury when she took the stand. Her conviction must be reversed in light of the recent holding in *Bruton v. United States, supra*, which ruling was long after the trial of this case. In fact, the decision was handed down subsequent to oral argument on this appeal. In *Bruton* the Supreme Court overruled *Delli Paoli v. United States*, 352 U. S. 232 (1957). It now clearly appears that *Bruton* has retroactive application.

Next, appellants contend their right to assistance of counsel was violated by the receipt into evidence of the admissions just described. The admissions were made to an FBI agent after the indictment was returned and in the absence of appellants' retained counsel. We note, again, that no objection was made to the admission of the evidence. In the absence of a proper objection we need not consider the question unless there is plain and substantial error on the record. Rule 52(b), F. R. Crim. P., 18 U. S. C. A.

A reading of the record indicates no plain and substantial error. The FBI agent testified that he spoke to appellants at their place of business on December 14, 1965, twelve days after the indictment was returned. *He told*

them he was there on another matter and warned both of them that they should not speak to him about the matter for which they were indicted. No part of appellant Lyon's conversation on that date was related in court; appellant Lysczyk's damaging statements were related. According to the agent, Lysczyk was advised that he had a right to have an attorney present during any conversation with the agent about the matter for which he was indicted and that anything he might tell the agent could be used in evidence against him. Lysczyk appeared to comprehend the warning and told the agent that he wanted to talk about his defense to the charges against him.

Another post-indictment conversation testified to by the agent was one with Lysczyk on March 31, 1966. On that occasion Lysczyk approached the agent and asked him if a prostitute had been apprehended. After the agent replied, Lysczyk made incriminating statements. No warnings were given by the agent.

On this record we hold the admissions were voluntarily made to the agent. Lysczyk spoke freely and his admissions were properly received in evidence. See *United States v. Smith*, 7 Cir., 379 F. 2d 628, cert. denied, 389 U. S. 993 (1967); *United States v. Gardner, supra; United States v. Accardi*, 2 Cir., 342 F. 2d 697, cert. denied, 382 U. S. 954 (1965).

As a sixth ground for reversal, appellants contend the trial court erred in reading Count I of the indictment to the jury and instructing them that to convict on Count I they must find that one or both of the appellants committed one of the overt acts alleged in the count. The instruction was error, appellants contend, because one of the

overt acts alleged in Count I was the mailing of a letter from Hurley, Wisconsin to St. Louis, Missouri and the trial court had ordered the jury to disregard all evidence of that act. The instruction, they say, was inconsistent with the earlier order striking the evidence and may have led the jury to believe they could consider it.

Before reading Count I to the jury, the court instructed that "testimony and exhibits * * * to which the Court has sustained an objection, or which the Court has ordered stricken from the record, do not constitute evidence, and must not be considered by the jury." This instruction, contemporaneous with the court's reading of the indictment to the jury, reinforced the court's earlier instruction to disregard the evidence. Appellants' interpretation of the instruction on Count I is unreasonable. Viewed in the context of the instructions as a whole, the challenged instruction was proper.

Appellants complain that they were denied their Sixth Amendment right of confrontation when they were not permitted to cross-examine Miss DeLay, a government witness. On direct examination Miss DeLay gave damaging testimony concerning her employment as a prostitute in appellants' establishment and concerning appellants' use of the facilities of interstate commerce. On cross-examination she refused, invoking the privilege against self-incrimination, to answer questions concerning her residence and employment at time of trial. After prolonged proceedings in chambers and in court, but outside the presence of the jury, the trial court ruled that the witness had not waived her privilege against self-incrimination and that she need not answer the questions put by defense counsel. On ap-

pellants' motion, the court ordered the witness' testimony stricken from the record and instructed the jury to disregard it. The court denied appellants' motion for mistrial.

Appellants maintain that the trial court erred in ruling the witness had not waived her privilege against self-incrimination, and, alternatively, that having refused to compel the witness to answer, the court erred in denying appellants' motion for mistrial.

As the Supreme Court recently held, the right of confrontation embraces the right to ask a witness where he lives at time of trial. See *Smith v. Illinois*, 390 U. S. 129 (1968). The questions put to witness DeLay were designed to identify her with her environment so that her credibility might be tested. They were therefore essential to appellants' right of confrontation. See *Smith v. Illinois, supra; Alford v. United States*, 282 U. S. 687 (1931). The trial court was required to protect appellants' right, short of compelling witness DeLay to violate her right against self-incrimination.

As a careful reading of the record indicates, the court's ruling that the witness did not waive her privilege by testifying on direct examination rests on two grounds. The first is that none of her testimony on direct examination related to the time after she left appellants' employment. The second ground is that the witness had been induced to testify by an FBI agent's statement that she would not be prosecuted.

The first ground given by the trial court is questionable. It is clear that a *defendant* who voluntarily testifies on direct examination may not assert the privilege on

cross-examination as to any matter made relevant by his testimony on direct examination. *Brown v. United States*, 356 U. S. 148 (1958); *Fitzpatrick v. United States*, 178 U. S. 304 (1900); *United States v. Pate*, 7 Cir., 357 F. 2d 911 (1966).

We would be reluctant to hold that a non-defendant witness may testify fully on direct examination, then invoke the privilege as a shield against questions probing his credibility on cross-examination. The witness' credibility is always a relevant matter on cross-examination. We need not reach that question, however, since the trial court's ruling is properly sustainable on the second ground. The court conducted an evidentiary hearing outside the presence of the jury and found that the witness DeLay believed when she agreed to testify that she had been given immunity from prosecution. We agree with the trial court's conclusion that her action in taking the witness stand was not a knowing waiver under the circumstances.

The next question is whether striking Miss DeLay's testimony adequately corrected any prejudice done to appellants. Generally the admission of evidence that is, or subsequently becomes, inadmissible is cured by striking the evidence and instructing the jury to disregard it. See *Maestas v. United States*, 10 Cir., 341 F. 2d 493 (1965); *United States v. DeDominicis*, 2 Cir., 332 F. 2d 207 (1964); *Conner v. United States*, 5 Cir., 322 F. 2d 647 (1963), cert. denied, 377 U .S. 907 (1964); *Fahning v. United States*, 5 Cir., 299 F. 2d 579 (1962).

We hold the corrective measure taken by the trial court was sufficient. Miss DeLay was one of several prostitutes who testified concerning their employment by appel-

lants, and much of her testimony was cumulative. Count IV of the indictment, which concerned Miss DeLay's interstate trip in furtherance of her employment as a prostitute, was dismissed. The jury was instructed to disregard her testimony after it was given and a similar general instruction was given as a part of the court's charge to the jury. While appellants characterize Miss DeLay's testimony as "sensational," it is hardly outstanding or sensational when viewed against the background of the other evidence adduced at trial. Finally, there is no indication that the Government acted in bad faith in putting Miss DeLay on the stand.

Appellants complain that the court erroneously received the testimony of several witnesses regarding events occurring prior or subsequent to the crime charged in the indictment. Three prostitutes testified to interstate telephone conversations with appellant Lyon and to employment by appellants as prostitutes outside the dates charged in the indictment. No objections were made. All also testified to interstate trips and telephone calls and to prostitution activity during the period charged in the indictment.

Appellant Lyon testified on cross-examination, over objection by defense counsel, that she started the prostitution business in 1959 and had issued 2,797 admittance cards by November, 1965.

Finally, an FBI agent testified that while he was present at appellants' place of business on September 15, 1965 he was approached by a lady who offered her services as a prostitute. This occurred, he testified, in the presence of appellant Lysczyk. Defense counsel objected.

We hold this evidence was properly admitted to show appellants' knowledge and intent, see *United States v. Phillips*, 7 Cir., 375 F. 2d 75, cert. denied, 389 U. S. 834 (1967), and the existence of a continuing course of conduct, see *United States v. Wolcoff*, 7 Cir., 379 F. 2d 521, cert. denied, 389 U. S. 929 (1967).

As a ninth ground for reversal, appellants contend they were prejudiced by certain remarks of the United States Attorney during final argument. He referred to "insult" he had taken from a witness, obviously referring to appellant Lyon's testimony that he had visited her house of prostitution. He also characterized the evidence as cluttered with disgusting and shocking, maybe dirty, disrespectful, dishonest testimony and ideas * * *." These remarks were not, in our view, improper or prejudicial.

Appellants contend they were denied a fair trial because the Government refused to grant immunity to two defense witnesses who refused to testify on grounds of self-incrimination. We concur in appellants' observation that "this is a rather unusual proposition of law" and agree that "no authorities can be found directly in point." We find no support for appellants' position in *Washington v. Texas*, 388 U. S. 14 (1967).

The final ground urged for reversal is that the Government did not make a prima facie case, failing to prove the *existence* of the Wisconsin statutes allegedly violated by appellants or to request that the trial court take judicial notice of the statutes. Three relevant Wisconsin statutes were cited in the indictment. The trial court instructed the jury on the elements of the offenses proscribed by those statutes and instructed that to convict appellants the jury

must find they carried on the business enterprise alleged and that such business enterprise violated one of the relevant statutes. The evidence was sufficient to prove that one or both of the appellants violated each of the statutes.

Appellants' contention is without merit. The trial court properly took judicial notice of the existence of the Wisconsin statutes. See *United States v. McCormick*, 7 Cir., 309 F. 2d 367 (1962), cert. denied, 372 U. S. 911 (1963).

As above indicated, the judgment of conviction of appellant Lyon must be reversed following the recent holding in *Bruton v. United States, supra*, and as to her the cause is remanded for a new trial. In view of our remandment for a new trial as to appellant Lyon, we have considered and passed upon her other claims of prejudicial error.

On consideration of the entire record, we conclude that the judgment of conviction of appellant Lysczyk should be affirmed.

AFFIRMED IN PART.
REVERSED IN PART AND REMANDED.

CUMMINGS, *Circuit Judge*, concurring in part and dissenting in part. Insofar as the judgment of conviction of appellants Lyon is reversed and remanded, I concur. However, I believe that the judgment of conviction of appellant Lysczyk should also be reversed and remanded.

Lysczyk's principal argument in this Court is that the affidavit supporting the search warrant authorizing seizure

of the ledger was chiefly based on information and belief and therefore the search under the resulting warrant violated his Fourth Amendment rights.[2] This argument was not made before the able trial judge so that he had no opportunity to take corrective action. Nevertheless, the use of the ledger at trial and in the jury's deliberations affected Lysczyk's substantial rights, requiring us to notice the deficiency of the affidavit under the plain error rule embodied in Rule 52(b) of the Federal Rules of Criminal Procedure. Where the error is clear and affects the substantial rights of a defendant, it is cognizable on appeal although not raised below. *Sykes v. United States*, 373 F. 2d 607, 612 (5th Cir. 1966), certiorari denied, 386 U. S. 977. If this affidavit was defective, the admission of the ledger picked up under the search warrant based on the affidavit was plain error within Rule 52(b). See *United States v. Nikrasch*, 367 F. 2d 740, 743-744 (7th Cir. 1966); *Smith v. United States*, 335 F. 2d 270, 274, note 13 (D. C. Cir. 1964); *United States v. Asendio*, 171 F. 2d 122, 124-125 (3rd Cir. 1948). This same question is likely to return to haunt us in the form of a *habeas corpus* proceeding or post-conviction motion, further justifying review on this appeal. See *Alexander v. United States*, 390 F. 2d 101, 103, note 3 (5th Cir. 1968).

The November 17, 1965, affidavit of the FBI agent upon which the search warrant issued provided as follows:

> "That he is a Special Agent of the Federal Bureau of Investigation, and that in that capacity he has personally investigated complaints of the violation of the

[2]The affidavit is part of the record on appeal, so that there is no need to go outside the record to consider this argument.

laws of the United States of America at Hurley, in the Western District of Wisconsin, and that of his own personal knowledge MARCIA LYON is the operator of Kay's Rooms and Hotel Bar, located at 7-9 Silver Street, Hurley, Wisconsin; and that as such operator and *on information and belief* she has maintained a ledger book containing numbers which have been assigned to acceptable patrons of her illegal operation of a house of prostitution within said premises; and that said ledger book contains the name of the city of address of such patron, followed by a numerical number which indicates the price paid for the services of a prostitute.

"That this affidavit is made for the purpose of securing a search warrant to seize the above-mentioned ledger book.

"That the grounds for the search and seizure are to preserve as evidence the above-mentioned records, which are evidence of the operation of an illegal house of prostitution, which constitutes the basis of a conspiracy to violate Section 1952 of Title 18 of the United States Code.

"Affiant further states that *on information and belief* your affiant says that the said Marcia Lyon has engaged in a conspiracy to violate Section 1952 of Title 18 of the United States Code by soliciting females from out of the state of Wisconsin, to wit, from St. Louis, Missouri, and Terre Haute, Indiana, to come to Wisconsin to engage in prostitution at her said place of business, and as a result of such solicitation females from both St. Louis, Missouri, and Terre Haute, Indiana, did travel into the Western District of Wisconsin for the purpose of and did engage in prostitution at said place of business, in violation of Section 1952 of Title 18 of the United States Code.

> "Affiant further states *on information and belief* that a significant portion of the numbers so assigned in said ledger book refer to patrons who reside outside of the State of Wisconsin." (Emphasis supplied.)

With the exception of the agent's personal knowledge that defendant Lyon was the operator of Kay's Rooms and Hotel Bar in Hurley, Wisconsin, the affidavit rests entirely on information and belief. No basis for the agent's information and belief is conveyed in the affidavit, and under Rule 41(c) of the Federal Rules of Criminal Procedure, the warrant can "issue only on affidavit." It is true that such an affidavit may be based on hearsay information, but the magistrate must be informed of some of the underlying circumstances supporting the informant's and affiant's requisite conclusions. He was not so advised by this affidavit. For failure to provide a sufficient basis for a finding of probable cause, this affidavit did not comply with the principles of the Fourth Amendment.[3] *Aguilar v. Texas*, 378 U. S. 108, 112-116; *Giordenello v. United States*, 357 U. S. 480, 486; *United States v. Roth*, 391 F. 2d 507 (7th Cir. 1967). As we held in *Roth*, "sufficient specificity of an affidavit for a search warrant 'is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police'" (at p. 511). Since the Government has not shown that this federal constitutional error was harmless, Lysczyk should receive a new trial

---

[3]Other points raised by Lysczyk are not considered in this dissenting opinion inasmuch as the Fourth Amendment point requires reversal.

without the ledger. *Chapman v. California*, 386 U. S. 18, 24.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	3
Conclusion	10

CITATIONS

Cases:

Aguilar v. *Texas*, 378 U.S. 108	6, 7
Brady v. *Maryland*, 373 U.S. 82	8
Bruton v. *United States*, 391 U.S. 123	2
Earl v. *United States*, 361 F.2d 531, 364 F.2d 666, rehearing denied, 364 F.2d 666, certiorari denied, 388 U.S. 921	8, 9
Indiviglio v. *United States*, 352 F.2d 276, certiorari denied, 383 U.S. 907	6
Jones v. *United States*, 362 U.S. 257	5
Kuhl v. *United States*, 370 F.2d 20	5
Morrison v. *United States*, 365 F.2d 521	8
Riggan v. *Virginia*, 384 U.S. 152	7
Segurola v. *United States*, 275 U.S. 106	5
United States v. *Burrell*, 324 F.2d 115, certiorari denied, 376 U.S. 937	5
United States v. *Soyka*, 394 F.2d 452, pending on petition for a writ of certiorari, No. 490 Misc., this Term	6
Washington v. *Texas*, 388 U.S. 14	10

Statutes and rules:

18 U.S.C. 371	2
18 U.S.C. 1952	2
Federal Rules of Criminal Procedure:	
Rule 41(e)	4, 5, 6
Rule 52(b)	5

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 336

ANTON LYSCZYK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1968. The petition for a writ of certiorari was filed on July 24, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals properly refused to entertain petitioner's claim, raised for the first time on appeal, that a ledger should have been excluded from evidence because the affidavit in support of the warrant under which it was seized failed to support the finding of probable cause.

2. Whether the government was required to grant immunity from prosecution to witnesses called by the defense, to enable them to testify without risk of self-incrimination.

STATEMENT

After a jury trial in the United States District Court for the Western District of Wisconsin, petitioner and one Marcia Lyon were convicted on two counts charging them with traveling in and using the facilities of interstate commerce with intent to carry on prostitution in violation of the laws of Wisconsin, and causing others so to travel, and with conspiring to do so (18 U.S.C. 1952, 371). Four other counts were dismissed before and at the trial. On June 19, 1967, petitioner and Miss Lyon were each sentenced to concurrent terms of three years' imprisonment and fined $1,000. The court of appeals affirmed as to petitioner, one judge dissenting on the question of the affidavit for the search warrant (Pet. App. 1a-18a).[1]

---

[1] Miss Lyon's conviction was reversed under *Bruton* v. *United States*, 391 U.S. 123, because oral admissions made by petitioner and received in evidence, implicated Miss Lyon. See Pet. App. 6a-7a.

The sufficiency of the evidence is not in issue. Four witnesses testified that, during the period charged in the indictment (See D. App. 6-8),[2] they worked as prostitutes at defendants' premises in Hurley, Wisconsin (D. App. 69-70, 77-78, 82, 87-88). One of these witnesses, Miss Payne, testified that on June 10, 1965, petitioner drove her to the airport at Ironwood, Michigan, and that from there she flew to Wausau, Wisconsin, to meet a man for purposes of prostitution. As with all her earnings, she paid half the proceeds of this meeting ($50) for "room and board" (D. App. 69-70).

F.B.I. Agent Wessel testified that on various occasions he had conversations with petitioner, at which petitioner admitted running a business in Hurley, Wisconsin, which employed prostitutes from out of state. Petitioner indicated that he was co-owner of the premises in which the house of prostitution operated and that he reaped profits from the enterprise. He also admitted having taken Alice Payne to the airport on June 10, 1965, knowing that the purpose of her trip was prostitution (D. App. 94-98; see Pet. App. 7a-8a).

ARGUMENT

1. At trial, a ledger seized by federal agents from defendants' premises pursuant to a search warrant was admitted into evidence. As described by petitioner's co-defendant, Miss Lyon, and the four prosti-

---

[2] "D. App." refers to defendants' appendix in the court of appeals, containing excerpts from the proceedings at trial. A copy of this appendix is on file with the Clerk of this Court.

tutes employed at their establishment, the ledger contained the names and city of origin of gentlemen customers, along with a number associated with each name. When they arrived at the door, the men were granted admittance after displaying a card showing the number (D. App. 75-76, 78-79, 87, 149-150). The ledger also had entries showing the girl with whom the gentlemen spent time and the amount paid for the room and to the girl (D. App. 151).

Petitioner objected at trial when the government first sought to introduce testimony concerning the ledger, solely on the grounds that the warrant had improperly been served on petitioner rather than on Miss Lyon, and that no warnings were given to Miss Lyon by the agents executing the warrant (D. App. 70-71). At a hearing outside the presence of the jury, an F.B.I. agent testified as to how the warrant had been executed (D. App. 72-75). The trial judge then ruled that the ledger had been properly seized and was admissible (D. App. 75).

On appeal, petitioner contended for the first time that the affidavit in support of the search warrant was not sufficient to show probable cause. The court of appeals, one judge dissenting, declined to consider the merits of this claim, relying on Rule 41(e), F. R. Crim. P. (Pet. App. 3a). In the context of this case, the court below acted permissibly in refusing to pass upon the sufficiency of the affidavit.

Rule 41(e) provides in part:

> * * * The motion [to suppress] shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of

> the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

The Rule was designed to create an orderly procedure for judicial resolution of "disputes over police conduct not immediately relevant to the question of guilt." *Jones* v. *United States*, 362 U.S. 257, 264; *Segurola* v. *United States*, 275 U.S. 106, 111-112. Numerous cases hold that, absent a motion to suppress prior to or during a trial, or a showing of excusable neglect in failing to make such a motion, claims of illegal search and seizure will not normally thereafter be reviewed. See, *e.g.*, *Kuhl* v. *United States*, 370 F. 2d 20, 21 (C.A. 9) (en banc); *United States* v. *Burrell*, 324 F. 2d 115, 119 (C.A. 7), certiorari denied, 376 U.S. 937.

Petitioner contends, however, that the affidavit in support of the warrant was clearly insufficient, and that admission of the ledger affected substantial rights, so that the question could be noticed under the "plain error" rule (Rule 52(b), F. R. Crim. P.). This was the view of the dissenting judge. Pet. App. 15a. We do not, of course, dispute the existence of power in a court of appeals to review "[p]lain errors or defects affecting substantial rights" in the context of Fourth Amendment claims, nor do we interpret the majority as denying that power. Rule 52(b), however, is by its own terms discretionary. With regard to whether or not discretion should be exercised, it is pertinent to point out, as the Second Circuit has reasoned, that the considerations of finality reflected in Rule 41 (e) have particular weight in cases like the present,

where a defendant has been represented by retained and experienced trial counsel, who must be assumed to have made a conscious decision not to raise the matter before the trial court. *Indiviglio* v. *United States*, 352 F. 2d 276, 280-281 (C.A. 2), certiorari denied, 383 U.S. 907. Especially where counsel has focused on the evidence before or at trial and has urged several grounds for its exclusion, it would frustrate the purpose of Rule 41(e) and sound interests of judicial administration—without any improvement in the reliability of the fact-finding process—to hold that a new theory for excluding the evidence must be entertained for the first time on appeal.

In any event, we do not believe that there was a plain deficiency in the affidavit. (The affidavit is set forth at Pet. 5-7.) While its pertinent allegations are couched in terms of information and belief, and there is nothing directly in the affidavit to indicate that the "affiant's unidentified source 'spoke with personal knowledge,'" *Aguilar* v. *Texas*, 378 U.S. 108, 113, the fact that he did so may be validly inferred from the detailed description of the ledger book in the affidavit.[8] It is unlikely that this detail would be known except to one personally familiar with the premises. See *United States* v. *Soyka*, 394 F. 2d 452, 453 (C.A. 2) (en banc), petition for a writ of certiorari pending, No. 490 Misc., this Term. In addition, the affiant re-

[8] The affidavit describes the ledger book as containing "numbers which have been assigned to acceptable patrons of her illegal operation of a house of prostitution * * * [and] the name of the city of address of such patron, followed by a numerical number which indicates the price paid for the services of a prostitute" (Pet. 6).

cited that he had personally investigated the complaints of illegal activities, knew personally that co-defendant Lyon operated the establishment in question, "and that as such operator *and* on information and belief she has maintained a ledger book containing numbers which have been assigned to acceptable patrons of her illegal operation of a house of prostitution * * *" (Pet. 5-6) (emphasis added). The affidavit here thus sets forth much more than the wholly conclusory affidavits in *Aguilar* v. *Texas*, *supra*, or *Riggan* v. *Virginia*, 384 U.S. 152. The affidavit is not so plainly insufficient as to render admission of the ledger "plain error." Moreover, although petitioner characterizes the ledger as a "key piece of physical evidence" (Pet. 11), it may be questioned whether its admission truly affected "substantial rights," in view of the independent testimony of the four prostitutes acknowledging that they plied their trade in petitioner's premises, and of petitioner's own numerous admissions of the illegal activity with which he was charged.

2. Well before the trial, the government had determined that it did not need as witnesses two men named Small and Stone, whom it had subpoenaed (D. App. 104-105). The record shows that the two men had been customers of some of the prostitutes who later testified at trial (D. App. 70, 88, 134-135).[4]

[4] The testimony of one of these prostitutes, Miss DeLay, was ordered stricken by the court after she invoked the Fifth Amendment on cross-examination with regard to questions about her present employment and other collateral matters deemed essential to an attack upon her credibility (see D. App. 141-142; Pet. App. 9a-12a). Miss DeLay indicated

The defense elected to call Small and Stone as its witnesses, but each invoked the privilege against self-incrimination with regard to all relevant matters. Defense counsel thereupon made a motion to the court to grant the witnesses immunity and also asked the prosecutor to do so. The prosecutor refused, and the court declined, on grounds of lack of power, to order that immunity be conferred (see D. App. 159-160). Petitioner argues that the government's failure to grant immunity to Small and Stone deprived him of a fair trial.

The court of appeals' decision rejecting this contention (Pet. App. 13a) is sound. There is no general obligation on the part of the government to insure that a witness the defense seeks to call will be available to testify without risking self-incrimination.[8] The precise question was presented, in a more difficult context, in *Earl* v. *United States*, 361 F. 2d 531 (C.A.D.C.), petition for rehearing en banc denied with statement of four dissenting judges, 364 F. 2d 666, certiorari denied, 388 U.S. 921; see also, *Morrison* v. *United States*, 365 F. 2d 521 (C.A.D.C.). In *Earl*, the defendant, who claimed that he was the victim of mistaken identification in a narcotics case, demanded that the government grant immunity to his co-defendant (against whom the instant charges had been dismissed following his plea of guilty to another crime), and tendered a proffer that the co-defendant

---

through counsel that Small was her present employer (D. App. 105).

[8] The question is quite distinguishable from problems of prosecutorial suppression of exculpatory physical evidence. See *Brady* v. *Maryland*, 373 U.S. 82.

would testify that he (the defendant) was not involved in the transaction. The court held that no rights of the defendant were transgressed, but indicated it would have more problems had the government secured testimony from one eyewitness under a grant of immunity, while denying this opportunity to a co-defendant. 361 F. 2d, at 534 n. 1. Here, unlike the situation in *Earl*, the defense made no proffer with respect to the witnesses' testimony, so that it is mere speculation whether their answers to defense counsel's questions would even have been favorable to the defense, much less potentially vital. Whatever the obligations of the government in a case such as the hypothetical one described by the court in *Earl*, there was plainly no duty to immunize Messrs. Small and Stone from all prosecution in order to permit petitioner access to testimony of uncertain content or significance. Re-enforcing the probability that anything they might have said would have been of only marginal weight and relevance is the overwhelming strength of the case—including petitioner's own admissions—against him.[6]

---

[6] For the same reason, the fact that one of the government's witnesses (Miss Payne) was promised that the charges against her would be dropped if she testified (see D. App. 77) does not bring this case within the hypothetical posed by the court of appeals in *Earl*. That hypothetical, which was viewed as raising a serious question of fairness, presupposes that there are two criminally inculpated eyewitnesses to a crime, one of whom, the defendant alleges, would testify as to his non-participation, and that the government grants immunity only to the other, who then inculpates the defendant at trial. Here, apart from Miss Payne, and Miss DeLay,

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROGER A. PAULEY,
Attorneys.

AUGUST 1968.

---

whose testimony was stricken, no government witness was offered any kind of immunity or incentive to testify.

We note further that *Washington* v. *Texas*, 388 U.S. 14, cited by petitioner (Pet. 13), is inapposite. That case held unconstitutional under the Sixth Amendment a State statute making a defendant absolutely incompetent as a witness for his co-defendant.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 317289 126